(2)

No. 99-2091

Supreme Court, U.S.
FILED
JUL 25 2000
CLERK

In The

Supreme Court of the United States

NATIONAL LOAN INVESTORS, L.P.,

Petitioner,

- against -

TOWN OF ORANGE; ARTHUR WILLIAMS and WATER POLLUTION CONTROL AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The Second Circuit Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

JOHN W. COLLERAN
Counsel of Record
JOHN W. COLLERAN, P.C.
19 Whitney Avenue
New Haven, CT 06510
(203) 865-2899

JEFFREY M. DONOFRIO
Attorney for Respondents
CIULLA & DONOFRIO, LLP
127 Washington Avenue
North Haven, CT 06473
(203) 239-9828

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6pp

REASONS FOR DENYING THE PETITION

1. None of the Issues Presented by the Petition Were Decided by the Second Circuit

The Petitioner presents three questions for this Court's consideration:

1. Does 12 U.S.C. § 1825(b)(3) bar the imposition of penalties against real property held by the FDIC as mortgagee?
2. Do the protections afforded to the FDIC by 12 U.S.C. § 1825(b)(3) inure to the benefit of its assignees and/or successors in interest?
3. Did the lower Courts err in finding that National Loan Investors, L.P., as assignee of the FDIC, was responsible for the penalty charge of $114,127.57 imposed during the FDIC's receivership?

After mentioning that the above issues were raised by the Appellant, the Second Circuit decision stated as follows: "Because we can resolve this case on another ground, we proceed to do so, and leave these three questions undecided." (Pet. App. 36) Therefore, this Court should not grant Certiorari to decide issues that specifically were not decided by the Second Circuit. An answer to these questions favorable to the Petitioner could not aid the Petitioner in any way in this case.

The reason why the Second Circuit declined to answer any of the aforementioned questions is because each question deals with the imposition of "penalties." In granting the Respondent's cross-appeal, the Second Circuit held that the contested charge was not a penalty. (Pet. A24-A25; A44-A54). In holding that the contested

charge was not a penalty, the Second Circuit correctly held that:

> – the Petitioner failed to carry its burden at trial of showing that the contested charge was in the nature of a penalty (Pet. A24-A25) (A44);
>
> – the section of the Connecticut General Statutes that governs the contested charge at issue (§ 12-146) characterizes the contested charge as "interest" (Pet. A46);
>
> – "Connecticut State law has construed § 12-146 and held that assessments of the kind at issue in this case are not in the nature of penalties because, among other reasons, the 18% rate 'was imposed primarily to ensure that municipalities receive fair compensation for delay and payment of taxes in light of fluctuating market rates, inflation, and collection costs.' " (Pet. A48-A49) (internal citation quoting *Town of Monroe v. 837 Main St. Corp.*, 45 Conn. Supp. 283, 292, 712 A.2d 996, 1000 (1997));
>
> – the Petitioner did not offer (or attempt to offer) any evidence at trial to show by what margin, if any, the assessment of the contested charge operates as a penalty (Pet. A52); and
>
> – the Petitioner failed to show at trial that the contested charge, in whole or in part, was assessed for a punitive, rather than compensatory, purpose (Pet. A52-A53).

The only conceivable issue on which the Petitioner could take an appeal was the Second Circuit's holding that the contested charge does not constitute a penalty. Most specifically, the Petitioner does not even mention

that issue in its "Questions Presented for Review". Presumably, the Petitioner did not ask for a review on that issue because it must have realized that such an appeal would be hopeless. The Second Circuit determined that the Petitioner bore the burden of establishing at trial that the contested charge was a penalty. It further determined that the Petitioner introduced no evidence whatsoever on that issue, and therefore failed completely to bear its burden of proof. Since the assessment at issue was not determined to be a penalty, none of the other issues had to even be reached.

2. This Case Does Not Involve Interpretation of 12 U.S.C. § 1825(b)(3)

The Second Circuit did not interpret 12 U.S.C. § 1825(b)(3). As discussed above, the Second Circuit found that the contested charge was not a penalty, thus obviating the necessity of an analysis of the implications of § 1825(b)(3).

The arguments set forth in pages 3-6 of the Petition are irrelevant. The Petitioner has merely recited its view of the status of the law concerning the availability of the exemptions under § 1825(b)(3) to assignees of the FDIC. While the Petitioner attacks the District Court's holding on page 5 of the Petition, absent from its argument is any discussion of the Second Circuit's holding on this issue. Of course, it would have been impossible for the Petitioner to address the Second Circuit's holding on this issue because the Second Circuit specifically declined to address the issue because it held that the contested charge was not a penalty. (Pet. A36-A54).

3. There is No Conflict Among the Circuit Courts of Appeal as to the Issues Decided by the Second Circuit in this Case

The Petitioner claims that there is a conflict among the Circuit Courts of Appeal on the issue of whether the protections of FIRREA apply to an assignee of the FDIC. Even if the Petitioner is correct, this conflict is irrelevant in the case at hand. The Second Circuit did not decide this issue in this case. Since the Second Circuit found that the contested charge was not a penalty, there was no need for it to address the question of whether an assignee of the FDIC is exempt from penalties assessed against receivership property and it specifically declined to address the issue. (Pet. A44).

Thus, while there may be a conflict among the Circuit Courts of Appeal, which statement is not conceded in any manner, this case is not involved in such an alleged conflict and is not the proper vehicle by which to resolve this issue.

CONCLUSION

The Second Circuit's decision is not ambiguous. The Court found that the contested charge was not a penalty and it sustained the Respondents' cross-appeal accordingly. Having found that no penalty existed, the Second Circuit properly declined to consider the issues implicated by 12 U.S.C. § 1825(b)(3), which specifically deals with penalties against property of the FDIC. Those are the issues which the Petitioner desires this Court to

decide. The Petition is fatally flawed and should be denied.

Respectfully submitted,

JOHN W. COLLERAN
JOHN W. COLLERAN, P.C.
Attorney for Respondent
19 Whitney Avenue
New Haven, CT 06510
(203) 865-2899

July 25, 2000